IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5852 OF 2006

Dr. Kiran S/o.Rajaram Nimbalkar, Aged about 31 yrs.Occ.Medical - Practitioner, R/o.24, Shrinagar, Jalgaon Rd.,Bhusawal, Dist.Jalgaon) .. Petitioner.

V/s.

1. State of Maharashtra through its Secretary, Health Department, Mantralaya, Mumbai- 32 and others.) .. Respondents.

Mr.P.J.Thorat, Atul Pande and N.B.Kalwaghe for the Petitioner.

Mr.R.D.Rane, Govt.Pleader for the Respondent Nos.1 & 4.

Mr.S.S.Aradhye with Mr.R.V.Govilkar for the Respondent No.2.

Mr.H.S.Karnik for the Respondent No.3.

Mr.S.S.Pandit for the Respondent No.5.

CORAM : F.I. REBELLO AND
R.M. SAVANT, JJ.

DATED : 22nd MARCH, 2007.

JUDGMENT :- (Per R.M.SAVANT,J.)

. Rule. Rule with consent of the parties made returnable forthwith and heard finally.

2. By this petition filed under Article 226 of the

Constitution of India, the petitioner challenges his non-selection to the post of lecturer in the Respondent No.3 College and the selection of the Respondent No.5 to the said post.

3. Such of the facts which are necessary to be cited for adjudication of the issue raised in the petition are stated thus :

. The Respondent No.3 is an affiliated college of the Respondent No.2 Health University. The Respondent No.3 college issued an advertisement in daily Lokmat on 21.01.2004 for the post of lecturer in Agad Tantra. The petitioner applied for the said post alongwith some other applicants. The Central Council Of Indian Medicine i.e."C.C.I.M.", for the sake of brevity, has framed regulations governing the appointment of teaching staff in Ayurved Colleges. The said regulations are applicable to the Respondent No.3 College. The said regulations, interalia, provide that if the post-graduate qualification holders are not available, then the candidates from allied subjects could be considered. Insofar as the subject of the Agad Tantra is concerned, the allied subjects are -(i) Dravyaguna and (ii) Kayachikitsa. A copy of the circular dated 15.05.2002 informing the Dean/ Pricnipal/Director of the all

Ayurved Colleges of the amended Regulations is annexed to the petition at Annexure ‘A’.

4. For the said selection, the Respondent No.3 had constituted a selection committee of seven persons, out of whom one was an expert in the concerned subject. The interview for the said post was held on 18.08.2004. In respect of the subject of Agad Tantra there were in all ten eligible candidates; out of which five candidates remained present for the said interview. Out of the said five candidates; two candidates were having the requisite qualification i.e. Post-graduation in Agad Tantra, which included the petitioner above named and the other three candidates were having post graduate qualification in the allied subjects. Pursuant to the said interview, the Respondent No.5 heareinabove, who was at the relevant time working as a resident Medical Officer in the Hospital of the Respondent No.3 and had a post graduation in the allied subject of Kayachikitsa, was selected. As stated above, it is the said selection of Respondent No.5, which has been impugned in the present petition.

5. On behalf of Respondents, affidavits, opposing the petition have been filed. On behalf of the Respondent No.4, an affidavit has been filed by one Dr.

Abdul Wahid A. Karim. After quoting the instructions for appointment of the teaching staff i.e. if a candidate having the post graduation qualification is not available, then the candidate from the "allied subject" can be appointed. The said affidavit goes on to say that the Respondent No.5 has been appointed, as the Selection Committee preferred the Respondent No.5 for an appointment to the said post of lecturer in Agad Tantra on merits than the other candidates, including the petitioner since the Subject Expert has given his opinion that the performance of the other candidates in the interview was poor and therefore, the respondent No.5 has been selected.

6. An affidavit is also filed on behalf of the Respondent No.2 Health University by one Govind Prabhakar Jadhav, the Dy. Registrar. In the said affidavit it has been stated that after seeking a clarification from the Respondent No.3 as to why the Respondent No.5 came to be selected when candidates having post graduation in the same subject were available and after receipt of the said clarification from the Respondent No.3, that the Respondent No.5 has been selected on merits, that the Respondent No.2 has granted approval to the appointment of the Respondent No.5. An affidavit has also been filed on behalf of the

Respondent No.3 by its Principal Dr.D.S.Pandit. In the said affidavit it is averred that since a duly constituted Selection Committee has selected the Respondent No.5 on the basis of merits, the said selection may not be interfered with by this court in its writ jurisdiction. The Respondent No.5 has also filed an affidavit which is on the same lines as that of the Respondent No.3 herein.

7. The underlying theme of all the said affidavits is that the Respondent No.5 was the most meritorious amongst the candidates who appeared for interview for the said post of lecturer in Agad Tantra and therefore, was selected.

8. On behalf of the Petitioner the principal contention of the learned counsel Shri P.J.Thorat, is that the appointment of the Respondent No.5 is in breach of the insturctions/ guide-lines of the C.C.I.M.. The learned counsel drew our attention to the circular dated 15.05.2002 which interalia contains instructions to the Dean/Principal/Director of All Ayurved Colleges in respect of the appointment to be made in the said colleges. According to the learned counsel the said instructions clearly state that if post graduate holders for the concerned subject are not available then the

post graduate qualification obtained in the allied subjects noted against the subject shall be admissible. A table below the said note shows against the said subject of Agad Tantra, the allied subjects of Kayachikitsa and Dravyaguna are mentioned. It is therefore, the submission of the learned counsel that the respondents could have considered the case of the respondent No.5 only if no candidate from the subject of Agad Tantra was available. Since the petitioner and another candidate were available, who had post graduate qualifications in the same subjects they ought to have been considered and selected in the light of the said instructions.

9. It was further submitted by the learned counsel for the petitioner that Respondent No.5 was not at all eligible as she has admittedly crossed the age limit and therefore, she could not have been even called for interview. Her selection, therefore, was in gross violation of the regulations, which prescribed the maximum age limit of 30 years for an open category candidate and 35 years for a reserved category candidate. According to the learned counsel for the petitioner, the Respondent No.5 was about 40 years old at the time of selection.

10. On behalf of the Respondent Nos. 1 to 4 Shri R.D.Rane, the learned Government Pleader contended that the Respondent No.5 has been selected by a Selection Committee of about seven members which also included an expert from the concerned subject and therefore, the selection of the Respondent No.5 calls for no interference. Similar submission was made on behalf of the Health University by Respondent No.2 R.V.Govilkar, the learned counsel appearing for it and also on behalf of the Respondent No.3 by the learned counsel Mr.M.S.Karnik, appearing for it.

11. On behalf of the Respondent No.5 i.e. the selected candidate, Mr.S.D.Pandit, the learned counsel submitted that the Respondent No.5 was an inservice candidate and therefore, the age limit was not applicable to such inservice candidate. On being queried as to whether there was any mention in the advertisement of a special concession to the inservice candidate, the learned counsel fairly conceded that there is no mention of any such concession in the advertisement. However, according to the learned counsel usually in such a selection age relaxation is granted to the in service candidate. For the said purpose, the learned counsel relied upon the Government Gazette dated 9th June, 1988 to contend that the

limitations as to age are not applicable to the inservice candidates. The learned counsel for the Respondent No.5 further submitted that Respondent No.5 has been appointed in the year 2004 and has also completed the probation period and has been confirmed in service. Therefore, the petition as filed was grossly belated.

12. In reply to the said submission of the learned counsel for the Respondent No.5 that the petition was belated, the learned counsel for the petitioner submitted that he was corresponding with the authorities and seeking information under the Right to Information Act, as to the reasons why Respondent No.5 was selected. Inspite of numerous letters written, there was no reply forthcoming and ultimately, a reply was received by the petitioner on 19.12.2005 after which the present petition was filed. Therefore, in the submission of the learned counsel for the petitioner the petition is not belated and the delay if any has occurred on account of the refusal of the authorities to reply to the letters addressed by the petitioner.

13. We have given our anxious consideration to the rival submissions of the respective parties. It is trite as laid down by a catena of decisions of the Apex

Court that the scope of judicial review in the matter of "selection" by a duly constituted selection committee is very limited. A useful reference could be made to the judgment of the Apex Court in **AIR 1990 87 SC 434** in the **matter of Dalpat Appasaheb Solunke vs. B.S.Mahajan.** In the said judgment if has been held that the decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection, or proved malafides affecting the selection etc..

14. In the instant case, the guide-lines prescribed by the C.C.I.M. for appointment to the post of lecturer, interalia, postulate that if post graduate holders in the concerned subjects are not available then candidates from the allied subjects should be considered. Admittedly, the petitioner and one another candidate were having post graduate qualifications in the concerned subject i.e. Agad Tantra from among five candidates who had appeared for the interview. We, therefore, inquired from the learned counsel appearing for the Respondent No.3 as to how or on what basis the comparative merits of the candidates were judged. We also asked the learned counsel as to whether a marking or grading system was followed by the selection

committee to judge the comparative merits. The learned counsel for the Respondent No.5 produced the record of selection committee, relating to the selection in question. A reading of the proceeding sheet in respect of the post in question shows that no marking or grading system was followed by the said selection committee. The noting in respect of the said post only shows that the Committee found the Respondent No.5 more meritorious than other candidates. Having gone through the said record, we are at a loss to understand as to how the Respondent No.3 could be said to be more meritorious in the absence of any marking or grading system being followed by the selection committee. In our view, a marking or grading system is a sine qua non in any selection process as otherwise the selection is susceptible to a charge of being arbitrary or capricious. More so in the instant case whom guide-lines/instructions in terms postulate that only if a post graduate in the concerned subject is not available then a candidate in other subjects could be considered. Since, the petitioner and another candidate in the same subject were available why their cases were overlooked and the respondent No.5 was preferred, cannot be known from the record of the proceedings of the selection committee in the absence of any grading or marking system, being followed. In the circumstances,

we are of the view that the process of selection followed by the said Committee was vitiated.

15. Another aspect to be noted is that the Respondent No.5 was not qualified as per the age limit prescribed in the advertisement. Though it is the case of the Respondent No.5 that she has been considered as a inservice candidate, the proceeding of the selection committee does not disclose such a consideration. In fact it is also not the case of the Respondents in any of the affidavits filed in the present petition. This in our view goes to the root of the matter. As indicated above, the case of the Respondent about the overwhelming merits of the Respondent No.5 vis-v-vis the other candidates is not borne out by the record of the selection committee. We, therefore, find considerable merit in the submission made by the learned counsel for the petitioner that the process of the selection was in breach and violation of the said instructions of the C.C.I.M. and therefore, arbitrary. The least that was expected in such a selection was that the selection committee ought to have followed a marking or grading system so that the comparative merits of the candidates could be judged more so in the facts of the instant case.

16. As regards the point of delay and latches which is raised on behalf of the Respondent No.5, we find no merit in the said contention. The learned counsel for the petitioner has drawn our attention to the letter dated 10.04.2005 addressed to the Director of Ayurved, State of Maharashtra by the petitioner. By the said letter the petitioner represented to the said authority against the selection of Respondent No.5. The petitioner on 15.05.2005 addressed a letter to the Principal of the College seeking clarification as regards to selection of Respondent No.5. Thereafter, vide letter dated 29.07.2005 the petitioner represented to the Vice Chancellor of the Health University. The petitioner ultimately received a reply on 19.12.2005 from the Vice Chancellor of the Health University. As can be seen that though the petitioner was corresponding with the authorities, the petitioner received a reply only on 19.12.2005.

17. In that view of the matter, the selection of the respondent No.5 to the post of lecturer Agad Tantra is unsustainable and would have to be set aside. The Respondents Nos. 1 to 4 are directed to carry out the process of selection to the post of lecturer Agad Tantra afresh by calling the same five candidates, who had appeared for interview on 18.08.2004, the respondents

would be well advised to follow a marking or grading system.

18. In the light of what we have expressed hereinabove, it would be desirable that a newly constituted selection committee should carry out the said de novo process of selection. The said committee asfaras possible to consist of persons who were not members of the earlier committee. Since we have set aside the selection of the Respondent No.5 made pursuant to the earlier selection process, the age bar would not apply to the petitioner or the other candidates who had appeared for interview on 18.08.2004. This relaxation would have to be granted in view of the judgement of the Apex Court in 1999 Supreme Court Cases 723, in which case the appellants before the Apex Court had successfully challenged the recruitment process, but who had crossed the upper age limit in the process pursuing the said legal remedy.

19. Since the Respondent No.5 was selected and continued as such since the year 2004, she would not be disturbed till a regular selected candidate is appointed in the said post of lecturer in Agad Tantra pursuant to our directions contained in this judgment.

20. Rule accordingly is made absolute to the aforesaid extent; with parties left to bear their respective costs.

(F.I.REBELLO,J.)

(R.M.SAVANT,J.)

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